

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE
LODGE 5**

-AND

**AWARD AND
OPINION**

CITY OF PHILADELPHIA

Docket No. 14-20-1300-0488

Grievant: Daniel H. Ayres PR# [REDACTED]

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BEFORE:

ERNEST WEISS, ARBITRATOR

APPEARANCES:

For the Union:

Marc L. Gellman, Esq.
Jennings Sigmond, P.C.

For the City:

Benjamin D. Salvina, Esq.
Labor Employment Unit

Issue:

Is this matter arbitrable, and if so, did the City violate the collective bargaining agreement when it suspended Sgt. Daniel H. Ayers for five days without pay and if so, what shall be the remedy?



PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of the collective bargaining agreement ("CBA") between the parties hereto, on May 29, 2014 I conducted an arbitration hearing at the offices of the American Arbitration Association, 230 Broad Street, 12th Floor, Philadelphia, PA, at which time the parties were offered a full opportunity to present evidence and argument in support of their respective positions. At that time, both the Union and the City submitted exhibits that were admitted, along with joint exhibits.

Post hearing briefs were received and considered herein.

BACKGROUND

Pursuant to the CBA between the City of Philadelphia ("City") and the Fraternal Order of Police, Lodge 5 ("Union"), governing the terms and conditions of employment for the bargaining unit members, the Union filed the instant grievance on behalf of Sgt. Daniel Ayres. The issues herein arose out of an incident that occurred on the night of April 28, 2011, at which time two police officers, I█████ M█████ and S█████ A█████, responded to a radio call directing them to an incident of alleged domestic abuse. Upon their arrival, they learned that they were at the home of an off-duty police officer, A█████ C█████, and following procedure called the station for a supervisor. Sgt. Ayers, their immediate supervisor, arrived shortly thereafter and evidence was collected, P.O. A█████ completed the required form in Sgt. Ayers' presence, and P.O. C█████ left the scene of the incident.

The Complainant had told the police officers and Lt. Branson, of the Internal Affairs Division ("IA") that her boyfriend, P. O. C█████, had choked

her several times in various parts of the residence and threatened to kill her and had a service weapon in the home. She was told to go to the Detective Bureau to be interviewed if she wished to pursue charges. Sgt. Ayers was called away to a more serious incident – an officer assist – and Lt. M. C. [REDACTED], Sgt. Ayers' immediate supervisor, was called to the scene so that a supervisor would be present. When he learned that P.O. C. [REDACTED] had left the scene, he reported this fact to his captain, who in turn, reported the incident to IA and Lt. A. [REDACTED] B. [REDACTED] arrived at the scene in the early hours of the morning of April 29, 2011. When P. O. C. [REDACTED], who had spent the night at his mother's home, called his voicemail the following morning at around 11 a.m., he had a message from his Sergeant to meet him at his home to retrieve his service weapon from his private gun locker. They then proceeded to the station house, where P.O. C. [REDACTED] turned his weapon and badge over to his Captain. Following an IA interview and report, Staff Inspector J. Bates determined that Sgt. Ayers was guilty of "failure to supervise," and for allowing P. O. C. [REDACTED] to leave the scene of a domestic violence incident. Following a hearing by Police Bureau of Investigation ("PBI") hearing and other procedures required by the CBA, Sgt. Ayers ("Grievant" or "Sgt. Ayres") was suspended for five days without pay. The Grievant stated that based on his seven years of experience as a police officer who had responded to hundreds – if not more – of domestic violence calls, he had not violated Directive 90.

EXHIBITS AND OPENING STATEMENTS

The following Joint Exhibits were offered and admitted into evidence:

J-1 The Collective Bargaining Agreement between the parties

J-2 Six Page Packet, consisting of the notice of charge, the history of disciplinary action taken with respect to the charge.

J-3 Notice of Grievance

The following City exhibits were offered and admitted into evidence:

C-1 Directive 90 – unilaterally drafted by the City and in effect at the time of the incident (since 1986); the Directive is currently being litigated by reason of the unilateral drafting and implementation.

C-2 Philadelphia Police Department Disciplinary Code 5/1/2010. This disciplinary code is the subject of a dispute and is currently being litigated at the Pennsylvania Labor Relations Board with regard to its contents. The Union reserved the right to offer any application that the hearing examiner's recommendation to the Pennsylvania Labor Relations Board's recent decision might have to this case.

U-1 Revised Directive 90 as of June 7, 2012

The parties stipulated to the date of the incident as being April 28, 2011. The parties further stipulated to Consolidated Statute Annotated Section 2701 (definition of simple assault) and Section 2711 (probable cause arrests in domestic violence cases).

The City's Opening Statement

The City opened its case in chief with a discussion and argument for an immediate award that the arbitration was barred on the grounds of timeliness. Following an off the record conversation with Capt. M [REDACTED], the City withdrew its timeliness argument and the issue of arbitrability, and moved on to the merits of the case.

Attorney Salvina summarized the background and anticipated testimony of P.O. M [REDACTED]. He moved on to state that Sgt. Ayers had violated Directive 90, Section 2(a), which specifically provides for action to

be taken in cases like the one before the arbitrator today, i.e. a person is guilty of simple assault, "if one attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." Further, that probable cause exists when there exist the following two elements: 1) an oral or written statement of the victim accusing the suspect of committing a criminal act; and 2) the officer's observation of physical injury to the victim. (See Directive 90 Section II. Police Power of Arrest) According to Attorney Salvina, both elements exist in this case, and that Sgt. Ayers stated in his IA statement that he observed the scratches, and the victim, Ms. R■■■■, told him that she was choked by P.O. C■■■■. Reading from Section 4 (b) of Directive 90, Attorney Salvina stated police officer determination of that which is domestic abuse and violence is "attempting to cause or intentionally, knowingly or recklessly causing bodily injury, or causing serious bodily injury with or without a deadly weapon."

Finally, quoting from Section 4(c)2 "the officer will" (not **may**) "take action against the defendant (alleged abuser) as follows: if the officer has probable cause to believe that a violent misdemeanor offense was committed. . . arrest and transport the defendant to the detective division of the occurrence." Instead, Sgt. Ayers specifically violated Directive 90 by not directing his subordinate officers to arrest P.O. C■■■■. Further, Sgt. Ayers allowed P.O. C■■■■ to leave the premises, and for approximately the following twenty-four hours, he had access to his service weapon. That concluded his opening.

The Union's Opening Statement

Attorney Gellman, for the Fraternal Order of Police, Lodge 5, began his opening by stating that the City's opening was a description of how the City wishes things had unfolded, three years earlier in April 2011, and to

conclude that what the Grievant did was wrong. It is the Union's position that Sgt. Ayers arrived on the scene with his lieutenant's knowledge, and was tasked with evaluating the situation, as he had done many, many times before. He stated that domestic calls were hardly unusual, and people involved in one or another kinds of family disputes often call 911 in seeking conflict resolution.

Attorney Gellman went on to say that the Grievant assessed all of the necessary factors (transcript page 48), observed the demeanor of the parties, heard what the victim had to say and separated the parties to ensure that calm would prevail. He decided there was not probable cause for arrest. Having made that decision, Sgt. Ayres let P.O. C [REDACTED] leave, as there was no reason to detain him. Attorney Gellman further stated that the issue before the arbitrator is not whether Directive 90 was violated, but rather whether he **failed to supervise**. He ended his opening statement with the traditional request for a "make whole" remedy.

THE CITY'S CONTENTIONS

Police Officer M [REDACTED]'s Testimony

Police Officer J [REDACTED] M [REDACTED] was sworn. On direct examination by Attorney Salinas, he testified that he had about thirteen years on the job, and described the incident as set forth in the Background portion of this Opinion. (The parties agree that there is no dispute as to the facts.) P.O. M [REDACTED] stated that they noticed marks on Ms. R [REDACTED] neck and P.O. A [REDACTED] pointed out an apparent swollen finger. The domestic form (Exhibit C-4) was marked for identification, and was described by P.O. M [REDACTED] to include various pieces of information related to a domestic call – which must be filled out regardless of the outcome. P.O. M [REDACTED] confirmed that the

information on C-4 mirrored his testimony of the events, that the form was completed prior to leaving the scene of the incident, and that he and his partner were directed to immediately report to IA, where they were interviewed by a lieutenant to whom he reiterated the same facts as he had just testified and were on C-4. Exhibit C-5, the IA interview was marked for identification, and P.O. M [REDACTED] stated that everything contained in the interview was true and accurate. After P.O. M [REDACTED] completed his testimony, C-4 and C-5 were admitted into evidence.

On cross-examination, P.O. M [REDACTED], who had been a police officer for about ten years at the time of the incident, testified to the same facts and added that Sgt. Ayers arrived at the scene at virtually the same time as he and his partner, and the three of them entered the scene together. He testified that there are instances, after making his observations and evaluation, that no crime had been committed. He stated that the actions of Sgt. Ayers was to attempt to defuse the "hectic" situation, and that after his partner, P.O. A [REDACTED] pointed out Ms. R [REDACTED] swollen finger, he saw scratches on her neck, which he acknowledged was slightly different from his response on the IA interview form taken shortly after leaving the incident scene. He stated that if there is a sign of injury, one should always make an arrest if the alleged offender is present. He further stated that to effectuate an arrest, a supervisor would have to be present.

Police Officer C [REDACTED] testimony

Police Officer A [REDACTED] R. C [REDACTED] testified on direct examination that he had been a police officer since 2007, and that his children were about [REDACTED] and [REDACTED] years old at the time of the incident in question. His version of the facts was substantially similar as those of P. O. M [REDACTED], and he further stated that his service weapon was in his gun safe on the second floor of the residence

at the time of the incident. C-6, marked for identification, was described by C-6 as the form used to turn in his service weapon which was accomplished at about 4:30 p.m. on April 29th. Some time later, he was interviewed by IA and he had an attorney with him. His IA interview statement, C-7, was marked for identification. He described the genesis of the activity and argument thereafter at the time of the incident, and denied any knowledge of how Ms. R-6 got the scratches on her neck.

On cross-examination, P.O. C-6 described how it came to pass that he, the homeowner, elected to leave the premises. He testified that he neither received any special treatment by Sgt. Ayers, nor had he committed any crime. C-6 and C-7 were admitted into evidence.

Lt. Allan Branson's Testimony

On direct examination, Lt. Branson testified that he first became a police officer in 1990, and after several promotions to the rank of lieutenant, he had been working in IA for about fifteen years. He testified that he spoke to Ms. R-6 upon his arrival, noting marks on her neck, and took photographs of those and the swollen finger. Three photographs of Ms. R-6 injuries at the time of the interview were admitted into evidence as C-8. Lt. Branson stated that he and his partner gathered additional information about P.O. C-6 whereabouts, and conducted a preliminary investigation with the police officers on the scene. In response to Attorney Salvina's question, Lt. Branson testified that C-1 was Directive 90, and that it mirrors the Criminal Code Section 2711, i.e., what actions police officers should take when confronted with a domestic abuse situation, and that it was originally promulgated after April 1986. He testified that Section 2, Police Power of Arrest, authorizes a warrantless arrest if there is evidence of physical abuse against a domestic partner, and that probable cause to make

such an arrest would be based on observations. He testified that based on what he saw at the scene, that he "certainly thought that there was probable cause to make an arrest."

Testifying to the content of Section 4(c), "If the officer has probable cause to believe that a felony offense or violent misdemeanor offense (only those listed in Section 2-A of this directive) was committed, arrest the defendant and transport to the Detective Division of the Occurrence." He stated that the Directive left no room for a police officer's discretion, and that, in fact, part of the reason for the Directive was that for any number of reasons, victims were reluctant to report such abuse. Based on what was observed, he stated that P.O. C [REDACTED] weapon should have been secured and he should have been arrested and transported.

C-9 was described as a summary of the information collected in connection with the investigation, and is most usually done at the beginning, not at the end of an investigation, and probably would have been done either on the night of the incident or the very next day after going back to IA. C-10 was described as a memo to the Police Commissioner from the Commanding Officer of Internal Affairs on the subject of Investigation IAD No. 11-1079, arising out of the incident at the C [REDACTED]/R [REDACTED] residence. Lt. Branson said that he collected the evidence, and that Staff Inspector Gerald Bates wrote the conclusions. Lt. Branson identified C-11 as his interview with Sgt. Ayres. The exhibit is a transcription of Lt. Branson's recorded interview with Sgt. Ayres. Lt. Branson testified that Sgt. Ayres stated that Ms. R [REDACTED] claimed she had been choked, that he observed scratches on her neck. He stated that this was pertinent, in that it reflects the Section 2711 issue of domestic violence and a statement corroborating same, and led him

to believe that there was probable cause for an arrest, and finally that he agreed with Inspector Bates' conclusion.

On cross-examination, in response to Attorney Gellman's questions, Lt. Branson argued that Sgt. Ayres had violated Directive 90, but did not find anything to suggest that he had acted inappropriately with regard to P.O. M [REDACTED] or P. O. A [REDACTED] at the scene, in his supervisory capacity because the interactions were to gather information from those officers that were on the scene. Lt. Branson stated that a police officer had discretion only within the limits of Directive 90. In response to Attorney Gellman's further questioning, Lt. Branson agreed that the investigative summary was dated February 6, 2012 and submitted to Staff Inspector Gates on or close to that date. He testified that since it was clear that P.O. C [REDACTED] had been abusive to his partner, Ms. R [REDACTED], the focus of the investigation was whether the responding officers had acted correctly with reference to Directive 90. The cross-examination was concluded, and Exhibits C-8, C-9, C-10 and C-11 were admitted into evidence.

UNION'S CONTENTIONS

Sgt. Daniel Ayres Testimony

On direct examination, Sgt. Ayres testified as to his history as a police officer and the many, many times, both as a police officer and as a sergeant, he had experience responding to domestic abuse calls. Attorney Salvina raised a continuing objection to the relevance of any domestic abuse calls other than the call to C [REDACTED] residence at issue. The objection was noted. Sgt. Ayres testified as to alternatives to arrest available to police officers at a domestic abuse scene, and the training one received which, taken together with experience, allowed the police officer to form his/her opinion as to the

totality of the circumstances. He testified to the facts of the radio call, his arrival at the scene, his supervision of his direct subordinates, Police Officers M [REDACTED] and A [REDACTED], as well as the interactions with Ms. R [REDACTED] and P.O. C [REDACTED], leading to C [REDACTED] leaving the scene. At that point, Ayres testified that he had reached the conclusion that there was insufficient evidence for probable cause to arrest. He stated that he didn't think the scratches were recent or see any evidence of choking, and therefore one of the required elements for a probable cause finding, pursuant to Directive 90, was not present.

He testified as to guidance provided in the flow chart (C-4) that accompanied the required domestic violence form. He testified that he did not believe that the police officers and sergeants at the scene had the authority to make an arrest, which requires the rank of captain or above.

On cross-examination, Sgt. Ayres acknowledged that he had no policy document (with him) to support his belief that a captain was required to effectuate an arrest. He reaffirmed his observation that the second prong was not met, based on observation of the household, and the nature of the scratches. After some discussion as to exactly what P.O. M [REDACTED] said, Attorney Gellman acknowledged that Sgt. Ayres would disagree with anyone who said that there was probable cause present at the scene on April 28th. Ultimately, Sgt. Ayres testified that at least Lt. Branson's judgment on probable cause was incorrect. He testified that he did not call IA about an incident involving a police officer, and that he included all the details in his interview with IA. Referring to C-11, Attorney Salvina asked him confirm that his testimony in that document referred to scratches, but that no mention was made of when they might have been made, nor was anything added when, in the last question in the interview, he was asked if he had anything

else to add. Sgt. Ayres conceded that he made no mention of whether the scratches were or were not recent in his recorded interview with Lt. Branson.

When cross-examination continued about prior disciplinary actions, Attorney Gellman objected to that line of questioning as not being relevant to the issue to be decided. Attorney Salvina stated that according to Lt. Branson's testimony, when Sgt. Ayres had failed to arrest C [REDACTED], he violated Directive 90. The prior record should be determined to be relevant because the prior offenses were all related to "failure to comply with any commissioner's orders, directives, regulations, etc., and that Sgt. Ayres failure to supervise in asking his supervisees to carry out a commissioner's directive." C-10, C-11 and C-12 (the interview of Sgt. Ayres, an Employee Assessment and Disciplinary Code 420) were marked for identification.

On redirect, Sgt. Ayres described the auto accidents that were the subject of the prior disciplines.

On Re-cross, Salvina pursued the point that Ayres not only failed to arrest P.O. C [REDACTED], but he also improperly let an offender leave a crime scene and failed to secure P.O. C [REDACTED] service weapon. On further questioning, Sgt. Ayres testified that he answered each of Lt. Branson's questions truthfully and accurately, and that Lt. Branson asked no follow up questions with respect to the scratches, after he was informed of the scratches.

DISCUSSION AND OPINION

This is a case where the facts are not in dispute, but there is dispute as to the interpretation of some of the critical facts.

To begin with, there is the question of whether the "failure to supervise," charge made against Sgt. Ayres is simply meant to include the supervision of his subordinates or whether it includes the supervision of the

scene as well. The specific language of the charge Disciplinary Code, Article VIII, Failure to Supervise §8-004-10 states "Failure to take supervisory action." It should be noted, however, that §8-003-10 has a separate charge of "Failure to properly supervise subordinates." Taken in context, then, the charge against Sgt. Ayres is clearly something more than failure to supervise the subordinates on the scene. I conclude that the City's interpretation of the intent of that section is correct.

In determining whether Sgt. Ayres failed to take supervisory action, it is necessary to review his actions. Was there probable cause to make an arrest? Sgt. Ayres said there wasn't, but P.O. M [REDACTED] and Lt. Branson disagree. Directive 90 states that police officers have no discretion as to making an arrest when probable cause exists. Sgt. Ayres testified the police officers have to use their discretion in making observations while collecting evidence and information. P.O. M [REDACTED], Sgt. Ayres and Lt. Branson all observed scratches on Ms. R [REDACTED] neck and the somewhat swollen finger, and that photos were taken of the injuries. In his interview with Lt. Branson, Sgt. Ayres did not mention whether the fact that he thought the scratches were not recent or severe, but rather this observation was first made at the arbitration hearing. Omitting this observation from the IA interview that was taken so soon after the incident raises a question of credibility. Sgt. Ayres failure to secure P.O. C [REDACTED] service weapon at the scene is a separate, and very troubling fact, since it allowed P.O. C [REDACTED] some additional twenty-four hours of access to the weapon.

I am persuaded that the more cautious and appropriate response to the scene should have been to secure the weapon and transport P.O. C [REDACTED] to the Detective Division for further questioning and processing as to the question of whether an arrest was appropriate.

Having thoroughly considered all the evidence, including the testimony, documents, exhibits, allegations and arguments of both parties at the hearing before me, I am persuaded that Sgt. Ayres failed to supervise as charged. I note that Attorney Salvina stated that there was a second charge of failure to make an arrest. In fact, the documentary evidence shows that there was only a single charge of failure to take supervisory action, and the prior disciplinary proceedings only addressed that single charge. Finally, it should be noted that in considering this matter, I did not consider Sgt. Ayres' prior disciplinary actions, which I deem to be irrelevant.

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE
LODGE 5**

-AND

AWARD

CITY OF PHILADELPHIA

Docket No. 14-20-1300-0488

Grievant: Sgt. Daniel H. Ayres PR# [REDACTED]

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The undersigned arbitrator, having been designated in accordance with the Collective Bargaining Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

The matter herein is arbitrable.

The grievance herein of Sgt. Daniel Ayres is denied.



ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY)

) ss:

COUNRY OF SOMERSET)

On this, 17th day of February, 2015, before me personally came and appeared Ernest Weiss, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

NOTARY PUBLIC OF NEW JERSEY
My Comm. Exp. 05/05/2015